CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1821.

East'n District.
June, 1821.

BAYON
vs.
VAVASSEUR.

BAYON vs. *VAVASSEUR.*

APPEAL from the court of the second district.

A party who does not object to the judge's charge, cannot complain of it on the appeal.

Warranty is of the nature of the contract of sale, not of its essence.

MARTIN, J. The plaintiff demands the rescission of the sale of a slave, on the ground of his being epileptic, and in the habit of running away; circumstances which, he alleges, were deceitfully and fraudulently concealed from him. By a special clause in the bill of sale, it is declared, that the seller does not guarantee that the slave is free from any disease, habit of running away, or other defect.

The answer denies only the alleged fraudulent or deceitful concealment. To this is added a general demurrer.

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There was a verdict, and judgment for the defendant, and the plaintiff appealed.

The record shews, that the defendant having introduced a witness to shew, that the slave was not epileptic, the plaintiff objected thereto, and the objection being over-ruled, took his bill of exceptions.

Mrs. Englesheim deposed, that she knew the slave bought by the plaintiff from the defendant, who is the object of the present suit. That she heard the plaintiff propose to the latter, to take the slave back, as he was epileptic, observing, that the defendant ought to recollect, that when he sold him to the plaintiff, the latter mentioned, he did not think any thing of the sore on his leg, but that if he had epileptic fits, or any other redhibitory disease, he would not take him on any consideration. When the defendant replied, the fellow had only a sore on one of his legs, and that he did not mention any other disorder in the bill of sale; but that this was only to avoid difficulties. He gave his word of honor, that the slave had no epileptic fits. He acknowleged, that the above conversation took place at the time of the sale, but that, although the slave, while in his posses-

sion, had fallen five or six times, had burnt his arm, and would have perished, had not assistance been procured; he was not convinced, that these were epileptic fits; and that, for this reason, he gave his word, that the slave had no incurable disease; that he would consider of the proposition of taking him back, and would give his answer in three or four days. The witness, from this conversation, verily believed, the defendant knew the slave was subject to epileptic fits, when he sold him.

Salon deposed, that about two years ago, he was working at the plantation of Chapduc, where he had the slave under his order; that he heard him, on the upper floor of the mill, groaning, as suffering great pain; that as soon as he saw the defendant, then his owner, he informed him of it, when he replied, he cared not whether he died; and begged the deponent to keep him, which he refused, fearful of employing him, as he was falling into epileptic fits, which made it dangerous to work with him. It was then understood between Chapduc and the defendant, that the slave was epileptic. The defendant told the witness not to be afraid of any thing happen-

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ing to the slave, for he felt the approaches of the fit. During the fits, the slave foamed at the mouth, and rolled his eyes most horribly. This was in June or July, 1818.

Renaud deposed, that in the beginning of August, 1819, he was present, when the defendant offered to sell the slave to the plaintiff, for $600, payable in one year. He said the slave had a sore leg; felt no inconvenience from it, and worked full as well. That he would not guarantee any thing in the bill of sale, as to that sore leg, but the plaintiff might rest assured, it was a slight defect. The plaintiff said, if the fellow was epileptic, or had any redhibitory disease, he would have nothing to do with him; and on the assurance of the defendant, that he had only a sore leg, he determined on purchasing. Fifteen or twenty days after, the slave fell into epileptic fits, and has fallen since, many times. When he drinks strong liquor, he invariably has fits. The plaintiff had hardly any benefit from him since the purchase, as he is addicted to drinking and running away: he has been kept in irons for some time.

Lamothe, the city jailor, deposed, that the slave was sold by the defendant to the plain-

tiff, in jail. The defendant sold him as he was, and declared him to be a bad subject; he had a sore leg. The witness was present at the first conversation of the parties, about the sale; he did not hear the defendant say the slave was epileptic, a run-away, or thief. He has always known him for a bad negro, *mauvais sujet.*

Fontaine deposed, he was the defendant's overseer during the seven or eight months preceding the sale. During that time, the slave behaved well and had no fits, to the witness's knowledge. He would have been worth, if he had not been afflicted with a sore leg and addicted to run away, $2000.

Bourgeois deposed, he knew the slave for the four years preceding the sale: he was a fine looking fellow, a creole and something of a carpenter. Had he not been addicted to run away and had his leg not been sore, he would have sold for $3000.

Beckle, a carpenter, deposed the slave is a good sawyer and hewer.

We are not informed by the record, of the name of the witness referred to in the bill of exceptions, and from the nature of the objection, I take him to be Fontaine, whose testi-

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mony tends to shew, that the slave was not subject to epileptic fits before the sale; but as his testimony shews, that he had no fit during seven or eight months, this circumstance might go some way in repelling the idea of a deceitful and fraudulent concealment in the defendant, as it tends to shew, that he might, as well as his overseer, be ignorant of the epilepsy of the slave. It does not appear to me, that the testimony was illegal.

Our attention is next drawn to a part of the judgment, in which it is stated, that the judge told the jury, that the bill of sale prevented the defendant from being liable in the ordinary way, for the diseases prohibited by law. It is, and I believe correctly, objected to by the defendant's counsel, that even if this part of the charge was erroneous, the plaintiff cannot be relieved against it in this court, as he did not file his bill of exceptions, nor complain of it in the district court.

It appears to me, the opinion expressed by the court is correct; warranty for redhibitory diseases is not of the essence, but only of the nature of the contract of sale, was introduced for the protection of vendees; and nothing prevents its being excluded from the

contract by an express stipulation, as in the present case.

The plaintiff and appellant urges, that the judgment is erroneous, inasmuch as the testimony shews, that the defendant knew of the existence of the redhibitory defects complained of, before the sale, and did not make them known. 1 *Martin*, 149, *Macarty* vs. *Bagneres*, *Cur. Phil.* 328, *n.* 28 *&* 30.

The defendant's counsel urges, that as to his knowlege of the existence of the redhibitory disease, the testimony is contradictory; and on this knowlege, it was the province and right of the jury to decide; that their decision, if erroneous, could be properly set aside, on a motion for a new trial only, and in such a case, this court would not disturb the finding of the jury. 5 *Martin's Rep.* 323. 8 *id.* 363, 393. That there is good reason to presume, from the low price, or other circumstances, that the plaintiff knew of the defect: *Cur. Phil. com. ter. cap.* 13, *n.* 29, *ff.* 21, 1, 1, *sec.* 6, in which case, there was no necessity for any disclosure by the defendant.

The defendant's answer admits, as it does not deny, the existence of the epilepsy and the habit of running away; nothing is put in

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issue but the deceitful and fraudulent concealment of these rehibitory defects. I have no doubt, that the defendant was bound to disclose them, unless they were known to the plaintiff; and therefore, if he withheld that knowlege, he concealed fraudulently and deceitfully. He was bound to prove this disclosure; he has not done so; we must conclude, he did not disclose. So that the fraud and deceit is manifest, unless the knowlege of the plaintiff rendered this disclosure vain and needless: *lex neminem cogit ad vana.*

The counsel insists, that the modicity of the price is evidence that these defects were known. A witness swears, had he not had a sore leg and been a run-away, he was worth $3000; another $2000. The price given is $600, at 12 months; less than one-third of the smallest sum. The circumstance of his being sold in jail, without any warranty, is presented as one, from which the knowlege of his being a run-away may well be implied in the plaintiff.

The modicity of the price; the place of the sale; the stipulation that the defendant would not be liable for any disease or defect, even redhibitory ones, are circumstances

which may be supposed to have gone a considerable way in inducing the jury to imply a knowlege in the plaintiff. They may have refused credit to the principal witness, Mrs. Englesheim, on account of some circumstance which affected her credibility. The judge mentions her near connection to one of the parties as such, and declares himself satisfied with the verdict.

It is true, the facts stated in the judgment cannot control, or be taken as, a statement on which this court may act; but the opinion of the judge, who tried the cause, of the correctness of the verdict, whether expressed in over-ruling a motion for a new trial, or in giving his judgment, is satisfactorily shewn by his declaration in his own court. I do not take his suggestion of the fact that considerations of friendship and connection, induced the jury to disbelieve a witness, as conclusive. It suffices, that they may have existed.

The neglect of the plaintiff, to apply for a new trial, is a circumstance which adds to the weight of others.

On the other side, the evidence in favour of the plaintiff, is so positive, and must be so decisive, if believed, that I think the verdict

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of the jury ought not to be conclusive upon us. I feel inclined to reverse the judgment and remand the case, with directions to the judge to submit it to a new trial.

MATHEWS, J. I concur in the opinion of my colleague.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded, with directions to the judge to submit it to a new trial.

Davesac for the plaintiff, ——— for the defendant.

GITZANDENER vs. *MACARTY.*

The capacity and signature of a justice of the peace to the *jurat*, of an answer to interrogatories is not to be certified as the record of a court, under the act of congress.

If the defendant do not move to dismiss the suit, for want of an answer to his interrogatory, he cannot assign it as error.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. This is an action on a promissory note; the defendant pleaded the general issue and set-off, and filed interrogatories, which the judge directed the plaintiff to answer on oath. He did so, before a person who styles himself a justice of the peace, for Frederic county, Maryland: the clerk of the

court of that county has certified the justice's capacity, and the chief judge of the fifth circuit, of which Frederic county constitutes a part, that of the clerk who certifies that of the chief judge; the seal of the county is affixed.

At the trial, the defendant's counsel objected to the reading of the plaintiff's answers to his interrogatories, on the ground that it did not appear that the answers were given before a person legally authorised; the court over-ruled the objections, and a bill of exceptions was taken.

The note being proven, judgment was given for its amount, the set-off was not allowed, and the defendant appealed.

He contends he was in time to make his objections, and it ought to have prevailed, and cites the case of *Center* vs. *Stockton & al.* 8 *Martin*, 212, and 2 *Martin's Digest*, 161.

The case fully establishes the proposition that the objection was timely.

But, I see no legal evidence of the official capacity, nor of the signature of the person before whom the answers purport to be sworn to. An attempt has been made to read these answers, under the act of congress prescribing the mode, in which records, in each

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state, shall be authenticated so as to take effect in every other state, approved May 26, 1790.

This act requires that the record should have the attestation of the clerk, and the seal of the court annexed, if there be a seal; together with the certificate of the judge, chief judge or presiding magistrate; now the clerk, judge and magistrate here spoken of, must be the officers of the court in which the record is kept. From any thing that appears here, the clerk of Frederic county has no more to do with the proceedings of a justice of the peace of that county, than the clerk of a parish court has to do with the proceedings of a justice of his parish, in this state, *i. e.* nothing at all—nor the chief judge of the fifth circuit of Maryland, with the record of the county court of Frederic county, than any district judge of this state has with the record of any of the parishes in his district. The answer cannot be read as a record of the state of Maryland, under the act of congress; and the signature and official capacity of the justice are not proved by testimony, nor certified by the executive of that state.

I conclude that the parish judge erred in suffering them to be read.

But the defendant concludes, that the suit must be dismissed, as the plaintiff did not file answers legally sworn to; that the consequence must be the same as if he had filed no answer at all.

It is true that the law has provided, that on failure of the plaintiff to answer the defendant's interrogatories, "his suit shall be dismissed at his costs, *on motion of the defendant.*"

It lies with the defendant to move for the dismissal of the suit; nothing obliges him to do it. The matter is at his election—but in this case, as in all others, where the party who may make the election, has done so, it can no longer recall it.

In this case it appears to me the defendant made his election not to move for the dismissal of the suit, because he suffered it to be put down for trial, without opposition; he permitted the trial to proceed, till the plaintiff established his claim by the proof of the defendant's signature at the bottom of the note. He took a chance of a judgment in his own favor, if the plaintiff had failed to make out his case, *actore non probante, absolvitur reus.* I think after all this, it was too late to move for a dismissal of the suit.

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The consequence is, that the judgment of the parish court ought, in my opinion, to be affirmed with costs.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Preston for the plaintiff, *Carleton* for the defendant.

DOANE vs. *FARROW.*

It is not necessary for the validity of an appeal bond, that it be signed by the appellant

Admission of a party that he is one of the members of a firm, may be received in evidence, although it appear that articles of partnership exist, & are not produced.

APPEAL from the court of the first district.

MARTIN, J. The petition states, that one R. Harris, in 1818, made a contract with the government of the united states, for the erection of fortifications on Dauphine Island, and immediately after entered into partnership with the defendant, on an equal footing, for carrying into effect Harris's engagement with government; and some time in May, 1819, the plaintiff and Harris entered into an engagement, by which the former undertook to make all the centers, scaffolds, &c., required in the erection of said fortifications; and also to cover the walls, and pump the water, when re-

quired by the masons, for the sum of two dollars for every thousand bricks laid; that in consequence the plaintiff went to Massachusetts, and soon after returned with twenty seven labourers and carpenters, paying forty dollars for the passage of each of them, besides their provisions, and necessary previous expenses, materials, &c.; that the plaintiff, with his said labourers, worked on the fortifications, and when he applied for money to the said Harris, he refused to pay any till the arrival of his partner, the defendant; that on the 31st of May, they made another agreement, by which the plaintiff agreed to furnish him, the said Harris, with five carpenters, Harris furnishing them with provisions, quarters, &c., and paying the plaintiff fifty-five dollars a month, for each of them; that there is due to the plaintiff thereon $12,362 85 cents, for his expenditures, the labour of his hands, &c., for which the said Harris and the defendant are liable.

The defendant pleaded the pendency of another suit in the state of Alabama, and the general issue.

There was judgment for the defendant, as in case of a non-suit, and the plaintiff appealed.

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The defendant and appellee prayed that the appeal might be dismissed, on the ground, that the appeal bond was not signed by the appellant, but by Livermore, his attorney, who does not style himself attorney in fact; who does not appear to have had any authority to execute the bond, and who filed the ordinary answer that there is not any error.

The record shews, that at the trial, the plaintiff offered J. Gordon as a witness, to prove that the defendant had admitted himself a partner of Harris, as set forth in the petition. This witness being admitted, declared he had seen written articles of partnership, between Harris and the defendant; that he had a certified copy of them, and believed the original was on record at Mobile, whereupon the defendant objected to any evidence being given of his admission, until the contract of partnership was produced, or shewn to be lost, as no notice had been given him to produce it.

The plaintiff next offered the testimony of E. Clark, and C. Clive, being the authorised agents of the defendant; and Harris, of the former having acknowleged them as such.— He also offered to prove the signatures of

Harris, Clive, and D. H. Henneway, and the residence of the two latter persons, in the state of Alabama.

These signatures are affixed to a contract, purporting to have been entered into by Harris and the present defendant, with the plaintiff, for work to be performed by the latter on the fortifications. That of Harris appeared as that of principal, and the two other as those of subscribing witnesses.

The reason which induced the court *a quo* to sustain these objections, are not very apparent from the record. We take them to be, that the court thought that no evidence of the plaintiff's claim ought to be admitted, till the existence of the pretended partnership was proved by the exhibition of the articles, or the absence of the document accounted for.

The case is thus before us on the exception to the legality of the appeal, and the two bills.

I think the appeal was properly granted; the appellant is only required to give security. This, in my opinion, may be done, without his obliging himself to a bond. The law binds him sufficiently to the performance of the decree of the supreme court, and one may

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as well give security for an obligation which the law imposes, as for one which he voluntarily enters into.

It is not contended that the surety was not legally bound, nor that he was not sufficient.

The two bills of exceptions depending on the same point may be considered together.

Articles of partnership are not of the essence of the contract; they may regulate its duration, the liability of each member among the rest, but not in regard to creditors of the partnership, and if the members continue to transact business, after the expiration of the contract, by its own limitation, they are nevertheless liable as before.

I think the district court erred in sustaining the defendant's objections, and that the judgment ought to be reversed, and the case remanded, with directions to admit the evidence mentioned in the two bills of exceptions, and that the costs in this court ought to be borne by the defendant and appellee.

MATHEWS, J. This case comes up on two bills of exceptions, and the appeal is required to be dismissed on account of irregularity and insufficiency in the appeal bond. It is

complained of as not having been signed by the appellant, or any person regularly authorised by him; having only the signature of the attorney who prosecutes the suit, as surety. The object of the bond in the present case, is to secure payment of the costs, and can extend no further. I am of opinion that a reasonable construction of our law, on the subject of appeal bonds, will not require that they should be executed by an appellant, especially in the case of a non-resident, as his bond would not create any new or additional obligation on him, beyond what is fixed and determined by the judgment. It ought to suffice if the bond be executed by a solvent surety.

The first bill of exceptions relates to the rejection of parol evidence, to establish the existence of a partnership, between the appellee and Harris, as set forth in the plaintiff's petition. The principle, on which the judge of the court below seems to have acted, is that which will not permit oral testimony in proof of facts contained in an instrument of writing, unless under certain circumstances, as authorised by law on the subject of evidence; as by giving notice to the opposite par-

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ty to produce the writing, or obtaining a subpœna for a witness, as it may be in the power of either. This would be correct in a contest between partners; but when one of a partnership is pursued as liable to a third person, on account of such partnership, I am of opinion that the plaintiff is not bound to shew any articles of partnership, which may have been reduced to writing between the partners themselves, to which he cannot in any way be presumed to be a party, they being entirely *res inter alios acta*. See *Watson on Part. p. 5, and seq.; and* 1 *Dallas' Reports*, 269. I therefore think the district court erred in rejecting the testimony offered to prove the partnership. The correctness or error of the opinion of the district court, to which the second bill of exceptions was filed, depends entirely on the first for its support, and as I believe that to be erroneous, the latter is without foundation.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded with direction to the judge to receive the evidence excepted to; the costs of the appeal to be paid by the defendant and appellee. *Richardson* vs. *Terrel*, 9 *Martin*, 1.

Pierce for the plaintiff, *Smith* for the defendant.

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SMITH vs. *CRAWFORD.*

APPEAL from the court of the third district.

Whether a party, who has not pleaded a release, can have a new trial on his affidavit that he has discovered, since the trial, the means of proving it.

MARTIN, J. A new trial was prayed for, on the affidavit of the defendant, that he had, since the trial, discovered material evidence, which he could not, by reasonable diligence, have discovered before.

The facts are, that the vaccine lottery never was drawn; that the plaintiff was only an agent, and could not sue in his own name; that the tickets received by the affiant, were returned before the commencement of the suit; that the holders of tickets for sale were released from all liability, before the commencement of the suit.

This evidence is sworn, to have been discovered in a conversation which the defendant's counsel had with A. Harraldson, who was examined as a witness on the occasion, and whose memory did not serve him with sufficient certainty, till he had recourse to certain papers.

The witnesses, by whom the facts newly

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discovered, are expected to be proved, are N. Robinson, and the conscience of the plaintiff.

The affiant swears to all this, from his confidence in Harraldson's statement, and the opinion of his counsel.

The new trial being denied, the defendant appealed.

I think the judge did not err in denying the new trial.

It was immaterial, whether the vaccine lottery was drawn; this circumstance could not discharge the defendant from his liability to account for the tickets. The plaintiff being only an agent is a circumstance which does not affect the merits of the case. The return of the tickets, and the release of the holders, are circumstances which the defendant did not plead.

I conclude the judgment ought to be affirmed with costs.

MATHEWS, J. Whether the defendant was bound to plead the return of the tickets, and consequent release of his obligation to account for them, or might have given these facts in evidence on the general issue, does

not, in my opinion, alter his situation in the present application for a new trial. They are facts which must have been completely within his own knowlege, and which he ought to have been prepared to prove on the trial of the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Eustis for the plaintiff, *Hennen* for the defendant.

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A new trial would not be granted, on the late discovery of evidence to be obtained from the opposite party.

APPEAL from the court of the third district.

MARTIN, J. This is an appeal from the denial of a new trial, on the affidavit of the defendant, stating the late discovery of new and material evidence, which reasonable diligence could not enable him to discover before the trial. This evidence is expected to be drawn from the conscience of the plaintiff, and the testimony of P. Ewing.

By the plaintiff, the defendant expects to prove that the goods, the price of which is sought to be recovered, were by him sold to

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J. H. Ficklin, and not to Ficklin & M'Micken; that the account was made out against Ficklin alone, and that the plaintiff never thought of making the defendant liable, till after Ficklin's death; and that the defendant discovered this, in a conversation with the plaintiff's counsel, who read him part of a letter from R. Lashaw, one of the plaintiff's partners.

The defendant does not inform the court, in his affidavit, of any thing which P. Ewing can prove.

The plaintiff's testimony can only be obtained in the mode pointed out by law, *i. e.* by filing interrogatories in the answer, and obtaining the judge's order.

I think the judgment of the district court ought to be affirmed with costs.

MATHEWS, J. I concur in this opinion. It is in my view so evidently conformable to law, and sound principles of practice in courts of justice, as to require no additional reasons to prove its correctness.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Eustis for plaintiff, *Hennen* for defendant.

MILTENBERGER vs. *CANON.*

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The sale of a slave is not completed till the notarial act, intended for it, be signed by the parties.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff states, the defendant promised to sell him a negro man, for the price of $650, engaging to secure him against any future claim, or to deliver him his title, whereupon the plaintiff paid the said sum, and received the slave; and the act of sale was postponed till the compliance of the defendant with either part of his engagement; that he has not complied, and refuses to receive the slave and return the price.

The answer states, that the sale was a perfect one; the slave was delivered, and the price paid; alleges the title was a good one. The defendant bought the slave from Dr. Williams of Baton rouge, before the parish judge, and would have given the plaintiff a copy of the sale, if the letter by which he applied for it, had not miscarried. He is now ready to do so. He concluded by a general denial.

There was judgment for the plaintiff, and the defendant appealed.

Carlisle Pollock deposed, that by the direc-

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tions of both parties, he drew an act of sale for the slave, which being read to them, the plaintiff refused to sign, as the defendant did not produce his title. The latter was then in possession of the former's note for the price of the slave, and promised to send up the river for the title, and to produce it on a given day, and the note was left with the deponent, it being agreed, that if the latter was not produced on the given day, the plaintiff should resume his note and the defendant the slave. The title was not produced on the given day. In the mean time, this deponent was told by the plaintiff, that he had discovered defects in the slave; was suspicious of the title, and requested him not to suffer the act to be executed. The defendant came some time after, and told the deponent he had seen the plaintiff, at whose desire he came to subscribe the act. The deponent, confiding in him, allowed him to sign. The plaintiff came after, denied having consented to the signature of the act, and declared his unwillingness to sign it. The defendant had received the plaintiff's note, on his special promise not to use it till the completion of the act, and on its being demanded of him by

the plaintiff, said he had negotiated it. The deponent thinks the time agreed upon to produce the title was four or five days, and it was expired, when the plaintiff desired the act might not be signed.

A bill of exceptions was taken to the admission of testimony, and the deposition was properly received.

The promise to sell not being written, was of no effect, *Civ. Code;* and according to the decision of this court, in the case of *De Clouet* vs. *Villere & al.* the defendant was not bound till the act was completed by the signature of the plaintiff. The latter could not be till he signed. Had the defendant negotiated the note of the plaintiff, before he deposited it with the notary, and made use of the proceeds; he might have insisted on the completion of the sale, if he produced the title, or give surety in due time. But he improperly obtained it from the notary, and is, therefore, bound to refund. I think we ought to affirm the judgment of the parish court.

MATHEWS, J. I concur in this opinion. According to the doctrine laid down in the case of *De Clouet* vs. *Villere & al.* and which I believe

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to be sound, there can be no doubt of the correctness of the judgment of the parish court. It is therefore ordered, adjudged and decreed, that it be affirmed with costs.

Davesac for the plaintiff, *Preston* for the defendant.

SPENCER vs. *STIRLING.*

Reasonable notice to the endorser is a mixed question of law and fact.

APPEAL from the court of the third district.

MARTIN, J. In this case, we gave judgment in March, 1819, and a re-hearing was soon after obtained. Nothing has been done in it since, and it is now submitted without an argument. It becomes, in my opinion, unnecessary for us to say any thing, except that the contested point, *viz.* the irregularity of the notice, has been re-examined in the case of *Chandler* vs. *Sterling*, in April last. 9 *Martin*, 565.

I conclude, that the former judgment ought to remain undisturbed.

MATHEWS, J. I think so.

It is therefore ordered, adjudged and decreed, that the former judgment of this court

be certified to the district court, as if no rehearing had been granted.

The judgment given in March, 1819, was as follows :—

MATHEWS, J. delivered the opinion of the court. In this case, Spencer, the holder of a bill of exchange, sues the defendant as endorser, and having obtained judgment against him in the court below, took the present appeal.

The only ground, on which the appellant resists payment, is want of due and reasonable notice of the dishonor of the bill by the drawer. It appears by the evidence in the case, that the holder made no attempt to communicate its fate to his immediate endorser, until about a month after the bill was protested.

Questions relating to the reasonableness of notice, in cases like the present, partake both of law and fact; they depend on facts such as the distance at which the parties live from each other, the course of the posts, &c. But when those facts are established, reasonableness of time becomes a question of law. Notice must be given by the earliest ordinary conveyance, unless under extraordinary cir-

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cumstances, which may excuse a greater delay. But the application of this rule of the law of merchants must depend on the proof of facts which shew the course of such conveyances, and the period at which they leave the place from where notice is to be given, destined to that where it is intended to send it, &c.

The laws of congress, on the subject of posts, do not fix and determine the period at which they are to leave any particular place in the united states, in their course through the union. It is believed that such regulations are left to the post-master general, and can be ascertained only by evidence, as in matter of fact. There is nothing found in the record of the present suit, shewing the periods at which the post leaves Nashville, or Charlotte, in Tennessee, for St. Francisville, in this state. The case was submitted to a jury in the district court, who found a general verdict in favour of the plaintiff, which amounts to a finding of all facts necessary to the support of their verdict; and it does not appear that any evidence was produced to establish such facts as are necessary to reduce the question of reasonableness, in relation to the

time of giving notice, to one of law alone. We are of opinion that there is no error in the judgment of the district court.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed with costs.

Morse for the plaintiff, *Duncan* for the defendant.

HATTON vs. *STILLWELL & AL.*

APPEAL from the court of the first district.

The plaintiff cannot read, in a suit against two defendants, a deposition taken in his suit, against one of them.

A suit brought on an attachment bond is not a continuation of the original one—so that the sheriff's return, in the former, may be amended, during the pendency of the latter.

MARTIN, J. Stillwell as principal, and Morse as surety, are sued on an attachment bond, and plead the general issue, and the pendency of another suit, in the same court, for the same cause of action, still undetermined: there was judgment, after a verdict, for the defendants, and the plaintiff appealed.

The case is placed before us on two bills of exceptions.

1. The plaintiff's counsel offered the deposition of one Bigelow, taken in the case of Hatton *vs.* Stillwell, and the records of the court, to shew that there have been but three suits in it, in which Hatton was plaintiff, two against Stillwell alone, and one against

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Stillwell & Morse. The district court was of opinion that the deposition was inadmissible, as it was taken in a suit between different parties, and not in the present.

2. He offered the deputy-sheriff as a witness to prove that the original process of attachment, in which the bond sued upon was given, was levied on the 20th of March, 1820, and prayed that the sheriff's return might accordingly be amended, which was refused.

I. It is urged that the deposition was taken in a suit brought by the present plaintiff, against the present defendant, Stillwell, alone, with whom the other defendant Morse, is now sued as surety. If, on inspection, the court is satisfied, the deposition was taken in the present suit, they will direct any misdescription of the parties to be amended.

But it is said there is no misdescription, Stillwell was the principal, and the mention of his name sufficed; particularly as it appears that Morse appeared by his attorney, before the commissioner.

II. During the pendency of the suit, it is contended, the officer may amend any error in his returns.

The present suit is said to have begun by the prayer of Stillwell, for an attachment, or giving bond with Morse as his surety; on its being obtained, a contingent responsibility attached on Morse; the dissolution of the attachment rendered it absolute. Hence, the present suit is a continuation only of the first.

It appears clear to me, that the court *a quo* did not err in rejecting depositions taken in a suit to which one of the present defendants, Morse, was not a party, though he may have been present, and cross-examined the witness, as the attorney, of one of the parties.

I cannot consider the present suit as a continuation of that brought by attachment, by one of the present defendants, against the now plaintiff; and the counsel admits that no amendment can be suffered, after the termination of the suit.

I conclude, the judgment ought to be affirmed.

MATHEWS, J. The depositions offered in evidence in this case, and rejected by the court below, as shewn by the record, were taken in another suit, and ought not to have been admitted against Morse, who was no party to that suit.

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I am clearly of opinion that the sheriff ought not to have been allowed to alter or amend his action, on the process and attachment, after the final determination of the original cause, which seems to have taken place before the commencement of this action.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Ripley for the plaintiff, *Morse* for the defendants.

WATERS vs. *BANKS.*

If the lessee, during the lease, divides the house, and underlets one half of it, and after the determination of the lease, the lessor receives one half of the rent from each party, he cannot afterwards charge his original lessee with the whole rent.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff claims $450, for three months rent of a house. The defendant contends, he only owes rent for one-half of the house, and for two months and a half only, *viz.* $187 50 cents, which he has always been ready to pay, and he has often tendered, and he has paid the said sum into the hands of the sheriff, for the use of the plaintiff.

There was judgment for the latter, and the defendant appealed.

The facts, as they appear on the record, are these :—On the 23d of December, 1818, the defendant rented the plaintiff's house for one year, at $150 a month. He immediately divided, and underlet one half of it to Tripp and Procter, for one year, at $75 per month, and in May following, he gave a power to the plaintiff, to collect the rent. It is not urged that any part of the rent is due for the period of the lease, before the expiration of which, the defendant rented the other half of the house to Passement.

At the expiration of the lease, Passement was in and kept possession of his half of the house, and the defendant of the other half, which had been before underlet to Tripp and Procter. Passement applied to the plaintiff's wife, who had a general power from her husband, to rent the half which he occupied ; and was answered, she could not say, whether the plaintiff would not wish to occupy it himself. The defendant made the like application; received the same answer; was promised the refusal, and told he might have it for one month.

On the 23d of January, 1820, the first month being expired, after the expiration of the writ-

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ten lease, for one year, the plaintiff's clerk went to Passement and the defendant, collected from each of them, one month's rent of their respective parts of the house, and paid the plaintiff's wife, who made no inquiry into the manner in which the rent was paid.

After the 23d of February, a second month being due, the clerk went to Passement, and collected from him $75, the month's rent, for his half of the house, and when he brought it to the plaintiff's wife, she inquired who had paid these $75, and being answered it was Passement, she told the clerk he had done wrong; he had nothing to do with Passement, and the whole rent ought to have been collected from the defendant. She afterwards received from the defendant, his second month's rent, and gave him a receipt therefor.

On the 23d of March, the rent, being due for the third month, was collected and receipted for, from the defendant and Passement separately.

That for April and May was demanded by the same clerk, from the defendant's wife, at the rate of $150 for the whole house; she refused payment, but tendered it for her husband's half. It was refused.

Before the expiration of the fifth month, (May) the defendant gave notice of his intention to quit the house in a fortnight.

On this, the defendant contends, he was indebted, at the inception of the suit, June 5, 1820, for the rent of the two months, which expired on the 23d of May, at the rate of $75 per month only, and for the half month, after the fifteen days notice, which did not expire till the 9th of June.

It is in evidence, that the plaintiff's wife acts for him, under a general power, even when he is present, and that he is frequently absent. Her acts, therefore, must bind him; and he must also be in the same manner bound by those of his clerk.

Had the defendant and Passement kept possession of the plaintiff's house, without any act of the plaintiff, or of the defendant and Passement, evidencing the parties desire that the lease of the house should be divided, the defendant would certainly have been bound, as under the lease for the rent of the whole house.

The wish of Passement to hold, individually, one half of the house, is evidenced by his application to the plaintiff's wife, to omit this

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half, by his payment of the rent for the months ending the 23d January, February and March; if he remained in it afterwards, this application and these payments would be evidence on which the rent might afterwards be demanded from him, at the rate at which he had paid it; and he could not, in such a case, meet the landlord's demand, by shewing a payment to the defendant.

The plaintiff's assent to each of the occupants holding separately results from the separate receipts given to each occupant, at the expiration of each of the three first months, which followed the expiration of the original lease. The objection of the plaintiff's wife, made to the clerk in February, while it was not made known to the parties, cannot avail the plaintiff, and appears to have been abandoned, by his receiving, without saying any thing, the rent paid by the defendant in February, and the clerk giving again separate receipts in March, to each occupant.

It seems to me clear, the rent was divided by the consent of all.

It is in evidence, that the defendant tendered all what he owed, and deposited it with the sheriff, for the use of the plaintiff.

I therefore think, that the judgment ought to be reversed, and ours ought to be for the defendant, with costs in both courts.

MATHEWS, J. Having examined the record in this case, I am fully satisfied with the opinion just pronounced. The only doubt I had relates to the costs; whether the tender and deposit of the money, in the hands of the sheriff, ought to exonerate the defendant from law charges. Our law is peculiarly careful, that defendants should not be vexed by unnecessary costs, as in order to charge them, an amicable demand is required on the part of the plaintiffs. In the present case, the defendant having tendered and deposited with the sheriff, the full amount of the plaintiff's just claim, I think, the former ought to be relieved from costs.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both courts.

Hennen for the plaintiff, *Pierce* for the defendant.

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The *quantum* of salvage is left to the discretion of the original court, and the supreme court will not disturb the judgment, when it does not appear that the discretion was improperly exercised.

APPEAL from the court of the first district.

MARTIN, J. This is an action for money, had and received. The defendant, as owner, and J. W. Brown, as master, of the brig Ceylon, filed their answer and claim, stating that the money claimed was saved at sea, from imminent danger and total loss, by the exertions and assistance of capt. Brown, and that they have a lien thereon for salvage. The district court allowed eight per cent. for salvage, and gave judgment for the balance in favour of the plaintiff; the defendant appealed.

The facts appear by a number of depositions.

Helot deposed, he was passenger on board of *le Navigateur*, of which the plaintiff was master, which was lost on the 6th of March last, on Chandeleur islands, about 2 A. M.; and he, the other passengers and some sailors, left the wreck at eight o'clock, in the long boat; and about four descried three vessels, among which was the brig Ceylon, on board of which they were received. A sloop, the foremost of the three vessels, appeared to avoid the long boat, while she made for her, but layed-to in

order to enable the boat to reach her. The boat, from the moment she left the wreck, leaked very much, and they kept one man constantly bailing her, and sometimes two; the sea was rough. After they reached the Ceylon, the weather grew bad, and continued so during the next day. He believes that had they not met the Ceylon, they must inevitably have been lost; the boat, in the opinion of the officer who commanded her, having avoided the shore, lest she should fall on the breakers. He, and most of his companions, remained on board of the Ceylon, from the 6th to the 20th of March, 9 o'clock A. M., when he left her with some of them, others remaining. When she reached the Balize, the wind grew back, and she broke her cable; and the wind blowing on land, she ran the risk of going ashore. The deponent, one hour after he got on board of the brig, took notice that the boat in which he came was almost full of water, and three hours after she disappeared. Capt. Brown informed him that when the boat got alongside the brig, she might have reached the Balize in two or three hours.

Hottine, Le Francais and Bressiere, deposed, that they were sailors on board of

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le Navigateur, which was lost near the Chandeleur islands, on the 6th of March last, at 2 A. M.; and after uselessly trying to save her, the people took to the *portemanteau* and long boat, in order to save themselves; the deponents, mate and passengers, got on board of the latter, and left the wreck at half-past seven A. M. They sailed along the islands, till they were compelled by the apprehension of falling on the breakers, to push off. At four P. M. they saw a sloop at anchor, and two vessels under sail. The sloop soon after sailed in such a direction, as induced the belief that she sought to avoid the long boat; the other vessels approaching, one of them the Ceylon, shortened sail, and afforded the boat the opportunity of reaching her; and the deponents, and their companions, got on board, and the Ceylon continuing her rout, cast anchor about half an hour afterwards, in seven fathoms of water. The Balize was about four miles distant when the boat reached the Ceylon. During the night it blew very fresh from N. E.; and at 10 o'clock P. M., the cable broke, and the Ceylon went adrift. The weather continued bad during the following day, and the deponents believe that had they not met

with the Ceylon, they could not have reached land before night, and they cannot tell what would have been the consequence. They believe they would have reached the Balize at dark. There were oars and a hawser.

Bribert, Le Villain, Quintin, Robillard and Cavet, deposed, they were passengers on board of *le Navigateur*, cast ashore on the Chandeleur islands, on the 6th of March, at 2 A. M.; that after pumping a long while, and endeavouring to save her, they forsook her. The mate, three sailors and the passengers, at half after seven got into the long boat. The passengers could take but a small part of their goods, as 600 lbs. of silver were put on board; the seams of the boat were not well closed, she made water, and one hand was constantly employed in bailing her. They sailed towards the island, but on approaching they were compelled to push off lest they should fall on the breakers. At 4 o'clock they perceived a sloop at anchor, which on seeing the boat, sailed, as if avoiding the boat, which perhaps was mistaken for that of some pirate. There were also two other vessels, one of which the Ceylon, shortened sail to allow the boat to reach her. They got on board at about five;

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the weather was cloudy, and it grew quite dark about one hour after. The anchor was cast about half an hour after the deponents reached the Ceylon, but no land could be seen. During the night the wind freshened, and the Ceylon went adrift. The weather continued bad on the following day. There was neither chart nor light on board the boat, but there was a compass. The captain of the third vessel hailed the Ceylon, and proposed to receive part of the people off the long boat, which the captain of the Ceylon declined, having a sufficiency of provisions. The deponents saw the plaintiff, master of *le Navigateur*, take a bag of money from the Ceylon. They are ignorant of the amount; from the bulk, they suppose, that if the bag contained silver only, there might be from $11 to 1200. From the condition of the long boat, and the state of the weather during the night, they believe that had not they been taken up, they would have inevitably perished. From the difference of opinion between the mate and one of the sailors on board of the boat, as to the bearing of the Balize, the deponents believe that their information was very incorrect, and they very little knew where they were.

B. Brown deposed, that he is the master of the Vigilant; he was sailing for the Balize in company with the Ceylon; at about 4 P. M. he discovered a boat steering about S.E., the Ceylon, being nearer to her, bore down, as did the Vigilant. The Ceylon soon came up with, and boarded the boat, and when the Vigilant came near, the people of the boat were getting on board of the Ceylon, and he understood they belonged to a French ship, cast away on the Chandeleur islands. In all appearance the boat was in great distress, and the people employed in bailing her. He thinks that when he first discovered her she might be at the distance of fifteen miles from the Balize. The wind had been blowing very fresh in the morning, and the day before, but moderated a little. After the captain of the Ceylon, had taken the people of the boat on board, he hailed the deponent, requesting that he might remain in company till the morning, as he was short of provisions, and might perhaps be able to send some of them on board of the Vigilant. Within half an hour, the wind began to increase and blow very fresh. The sea was running very high, even at the time the boat was taken on board, a fresh gale blew.

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The opinion of the deponent (a very experienced seaman, who has been at sea for seventeen years) is, that the boat could not have survived an hour longer, had she not been received by some vessel. When the boat reached the Ceylon, the land was not to be seen. The weather was dark and cloudy, but even, had it been clear, he believes it was at too great a distance to be seen. After having run about eight hours from the time of meeting the boat, the deponent fell in with a schooner, from which he learned that they had seen land that afternoon, and that they judged the light-house to bear S. E. and by S. The deponent had been running an hour and a quarter to make these eight miles, and hove about to inform the captain of the Ceylon of what the schooner said. They agreed to come to an anchor. The wind kept increasing all the time, and during the night blew an extraordinary gale. It was so strong during the night that the deponent was obliged to pay about seventy-five fathoms of cable to his anchor, and still dragged it, and from thirteen fathoms he drifted into five. There was a current setting out, which broke up a sea over the deponent's vessel; not having a single man

dry on board. The boat of the *le Navigateur* would not have lived five minutes in that sea, and from the course she was steering, when she was picked up, she must have gone into it. The gale still continued on the following day. The deponent remained at anchor during the night, so did the Ceylon, at the distance of three quarters of a mile; on the morning of the 8th, the deponent set sail with the Ceylon, to get into the Balize. The wind was so strong, that the pilot could not come out, and both vessels were driven to sea. The deponent remained out six or seven days, and came to anchor inside of the Balize, the same day as the Ceylon, *viz.* on the 19th, having remained some days at anchor outside of the bar. As the deponent was bearing for the boat, he met with a sloop, which had been laying at anchor, and was making sail. He heard from her, that she had not dared to board the boat, being afraid the people were pirates, although stated to have been cast away. About the time he was speaking to the sloop, the Ceylon was bearing to for the boat. He has been a regular trader out of this port since 1817; at the time the boat was picked up, he had not had a good observation for

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four days, and did not know where he was, owing to the cloudiness of the weather.

On his cross-examination, deponent said his ship's company consisted of seven, including himself and a boy. The Ceylon may be a brig of about 120 tons, he knows not what was the number of her crew. When he first descried the boat from his fore-yard, he took her to be the light-house; the weather was hazy, and he thinks he was about four miles from her. The boat was making sail towards the Ceylon, which bore down upon her. He perceived the distress of the boat, when he came up with the Ceylon, along side of which she then was. He inferred her distress from the number of persons on board, and the quantity of baggage passing on board of the Ceylon, and the bailing of the boat; she had one or two sails, but he saw no oar, and thinks from the quantity of people on board, none could be used. The Ceylon was detained a quarter or half an hour in taking on board the contents of the boat, and she came to an anchor that night, on account of the shortness of her provisions, as the captain stated, and in hope of being able the next morning to send some of the people on board of the Vigilant.

A wish to assist the Ceylon in that object, induced the deponent to come to an anchor that night, which, in the deponent's opinion, was a deviation from the voyage. It was about six P. M. when both vessels came to an anchor. The deponent thinks they must have been about eight miles from the nearest land, when the boat was picked up, and he believes they were sailing at the rate of five miles an hour.

Hallowells deposed, he was a passenger, and acted as master on board of the Ceylon; about 4 P. M. of the 7th of March last, they discovered a boat, about fifteen miles from land, which was making signals, they stood towards her, and took the people on board. They proved to be the passengers, and part of the crew of the French brig *le Navigateur*, wrecked on the Chandeleur islands; that at the time they received the people on board, the weather was thick and rainy, and land was not in sight. In the course of the night it came on to blow a violent gale of wind, and the deponent is certain that the boat could not have lived after the men were picked up. The Ceylon parted her cable that night in the gale, which continued three or four days. From the nature of the coast, or the direction

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in which the boat was sailing, even if they had reached the shore, they could not have saved themselves. The boat had a compass on board, but the glass was broke so as to render it nearly useless. The Ceylon was short of provisions at the time they received the crew of the boat, and was obliged to purchase before she reached the port; she was eighteen days from New-York. The people of the boat were fed by the captain of the Ceylon, while they were on board of her. The deponent judges that when they took up the boat, the Ceylon was sailing S. W. by W. The passengers of the boat said, at the time they were taken up, they did not know where they were going. The wind was N. E., the boat was veered astern of the Ceylon, by a hawser, and sunk that night in the gale. The light-house at the Balize is two leagues from the sea.

M'Clintock deposed, that on the 6th or 7th of March, he was in the schooner Caroline, which he commanded, standing in for the Balize; at night it came on to blow a violent gale of wind, which considerably damaged his sails. He does not think that a long boat could have lived in the gale, and even if she

had been driven ashore, she must have been stove, and the persons on board must have perished. In standing in for the land, the deponent spoke two vessels, one of them a brig, having a large boat in tow. They inquired of him where they were, and the deponent having made the land, directed them as to the course they should steer, to the best of his judgment, as he was not certain himself. The weather had been thick for two days before, and he had not been able to take an observation.

This concluded the testimony for the defendant and appellee.

Heuze deposed, he was mate on board of the French brig *le Navigateur*, lost on the 6th of March, on Chandeleur islands, and took the command of the long boat, in which all the passengers, five sailors, and a raw hand, embarked. She was provided with two suits of sail, five oars, one of which was used as a mast, caulking irons, tar and every thing necessary to repair her, in case of accident; two anchors, fifty fathoms of three inch rope, entirely new, and half a piece, or sixty fathoms of string, new also; twelve gallons of water, half a barrel biscuit, a whole cheese, twenty

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bottles of wine, a compass and a sextant.—A barrel, four boxes and nine bags of money were put on board. The boat left the wreck about 8 A. M., the weather was fair, and the sea calm, the wind at N. He steered S. W. till about 2 P. M., then alternately S. and S. W.; at about half after three he descried a sloop at anchor, and steered for her, *i. e.* S.S.E.; when the boat was within a quarter of a league from her, she started, in order to avoid the boat. The deponent finding himself unable to overtake her, lay-to for two vessels which were behind, sailing towards him, with a fair wind; one of them, a brig, passed within hail without stopping: the deponent made a signal of distress, and she shortened sail in order to enable the deponent to reach her. He did so in ten minutes, and found her to be the Ceylon of New-York, the master of which consented to receive the people and contents of the boat, and took the money under his care. He was informed by the master, that the Balize was, according to his reckoning, four miles distant. The Ceylon continued her rout till about 5 o'clock, when she cast anchor in eight or nine fathoms. The wind rose during the night and she parted her cable. The

master appeared uneasy on account of the vicinity of the land, and sailed off and on. In the moment the deponent saw the light-house of the Balize, at the distance of half an hour's sail. The wind having changed, the Ceylon could not enter the river, and put to sea, where a calm retained her for several days, so that she did not reach the bar before the fourth day. He cast anchor, and entered only four days after. The deponent is a stranger to the country, and never sailed in these seas. The glass of the compass was broke when the boat reached the Ceylon, but might still be used. There were in all twenty-one persons in the boat. The deponent is master of the vessel, twenty-five years of age, and navigator since he was nine years old; he has no doubt that he would have reached the land before night, had he not met the Ceylon, as the boat went at the rate of four knots an hour.

He knew what course he ought to have taken from the Chandeleur islands, to reach the land, it was S. S. W.; when they were taken up by the Ceylon, it was fine weather. He made no allowance for the current, thinking the distance too short to require any. He considered he was about two leagues from the land.

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He had not seen it for two hours, but had followed it. The land he had seen two hours before was Chandeleur islands, and Grand Gozier.

Dumont deposed, that he was lieutenant on board of *le Navigateur*, and left her with the captain, in the small boat, about 10 o'clock. There were about eight persons in this boat, and it had but one seat. They landed at about 6 P. M., on Breton island, distant about ten leagues from the wreck. They passed the night there. The small boat was deeper loaded than the long one, and had only six inches out of water, while the long boat had a foot at least. The weather was bad when they landed, and the sea grew high soon after they entered the river, at Plaquemine. On board of the long boat there were two persons acquainted with the coast.

Thimothy Dawes deposed, he has been at sea thirty years. A compass in an open boat, with the glass broke, in stormy weather, is unfit for navigation.

The *quantum* of salvage is, in every case, left to the discretion of the court, and in the present, it does not appear to me that the district judge exercised his improperly. The judgment should be affirmed.

MATHEWS, J. I concur in this opinion. On examining the evidence in the case, I see nothing attendant on the transaction, either in relation to labour, peril or risk, that would authorise a larger portion of the property saved to be decreed to the sailors, than that which has been allowed by the district court.

As to the expense of supporting the persons who were taken up and brought into port, it might have been made a separate charge, but ought not to be taken into consideration in estimating salvage on account of the property.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Moreau for the plaintiff, *Carleton* for the defendant.

BOLTON & AL. vs. *HARROD & AL.*

APPEAL from the court of the first district.

If the endorser be sued on the protest for non acceptance, in order to compel him to give security, and afterwards, on the protest for non payment, on

MARTIN, J. On the 30th of August, 1819, the present suit was brought for the purpose of obtaining security for the payment of a bill of exchange (endorsed by the defendants

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judgment being obtained in the last suit, the plaintiff cannot recover costs in the former.

to the plaintiffs, and protested for non-acceptance) at its maturity.

On the 20th of November following, the present plaintiffs instituted another suit against the defendants, to obtain the payment of the amount of the bill, which had been, in the mean while, protested for non-payment, in which a judgment was given for the plaintiffs, which was affirmed by this court, on the 7th of March last. 9 *Martin*, 326.

On the 12th of April last, the district court gave the following judgment: "This court is now called on to give judgment for costs against the defendants. This cannot be done. Costs are incidental to a judgment, as interest to to the principal. If that be paid, judgment cannot be rendered for the interest. Neither can a party be decreed to pay costs, unless there be a final judgment in the matter in controversy between the parties, or a judgment of non-suit or dismissal. As no decree can be made in favour of the plaintiffs, the petition must be dismissed; and on all cases of dismissal, the plaintiffs must pay costs. It is ordered the petition be dismissed with costs."

I think the district court was perfectly correct. The plaintiff's right of action, or the protest for non-acceptance, was merged in

the right which resulted from the protest of non-payment, and when the matter became *res judicata*, by the judgment, all antecedent right was destroyed.

The principles invoked by the district court, were recognised by the superior court of the late territory. *Pitot* vs. *Faurie*, 2 *Martin*, 83. *Nugent* vs. *Delhome*, 383.

Mathews, J. This case, as it now stands before the court, relates solely to a dispute about costs. The general rule is, that costs must follow the judgment; and I see nothing in the manner in which the present cause has been conducted, to require that it should be made an exception to that rule.

It is therefore ordered, that the judgment of the district court be affirmed with costs.

Hennen for the plaintiff, *Livingston* for the defendant.

SEDWELL'S ASSIGNEE vs. *MOORE.*

Appeal from the court of the third district.

The assignee may sue in his own name.

Martin, J. This is an action on a judgment obtained in Kentucky, by Sedwell, against the present defendant, and one Craig, which was

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afterwards assigned to the present plaintiff. The defendant pleaded, that the judgment was obtained through the fraud of the present plaintiff. There was judgment for the plaintiff and the defendant appealed.

The only piece of evidence in the cause, is the deposition of Sedwell, the plaintiff's assignee. He deposes, that in 1805 or 1806, Moore and Craig bargained with him for a quantity of whiskey, amounting to $216 75 cents, including the barrels, which he delivered to the present plaintiff, who carried it away; and the deponent charged the said Moore and Craig therewith; they having previously made arrangements with the deponent, that he, the plaintiff, would give him his note for the whiskey, but he ever evaded doing so, whereupon the deponent instituted a suit against Moore and Craig, when Craig represented to him, that Moore had received exclusively the proceeds of the whiskey, and it would be hard, if he, Craig, was obliged to pay therefor, and proposed, to give his note with the present plaintiff, as his surety, provided the deponent indulged them with some time, and permitted them to use his name, in order to recover from Moore. This being

assented to, Craig and the present plaintiff, gave the deponent their note, which has since been paid. A suit was brought accordingly, against Moore and Craig, by the present plaintiff, in this deponent's name, who was assured that he would be indemnified against the costs, which have, however, been since claimed from him; and the plaintiff has retained about $40 for his attendance on the said suit, &c. and he was surprised to find, that the present plaintiff was a witness in said suit, knowing that he had an interest therein. The deponent believes he had given the present plaintiff some authority to receive or recover the money from Moore, Craig being insolvent.

1. The defendant and appellant contends, that the plaintiff has irregularly brought his action in his own name, as assignee of Sedwell, and ought to have brought it in Sedwell's name, on the general principle of law, that a chose in action is not assignable. He cites *Co. Litt.* 204, and urges, that the assignment only gave to the assignee the right to using the assigner's name.

2. That the defendant has proved, by Sedwell himself, that he had no cause of action

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against him, when he instituted the suit, and obtained the judgment, on which the present suit is brought. That the testimony of Sedwell is legal, and conclusively proves, that he could not recover in the present suit, therefore, his assignee cannot.

3. That the evidence shews fraud in obtaining the judgment. He used Sedwell's name, obtained the judgment on his own testimony and now sues to enforce it.

The plaintiff and appellee has failed to appear and answer in this court, and the case, after the expiration of the legal delay, is heard *ex-parte*.

I. There does not appear to be any weight in the first objection. The principle of the common law cited, not being recognised in this state. An assignee may either sue in his own name, or such as use his assignee's name.

II. The testimony of Sedwell shews, that the present defendant owes the money, and has never paid any part of it. That the assignee paid, on the condition that he should receive a transfer of the plaintiff's right of action.

III. It does not appear that more was recovered from the defendant, than he actually owed; indeed, the deposition of Sedwell shews, that no more was recovered; that there cannot be any fraud. The irregularity of the testimony received cannot affect a judgment which is correct, as to the claim which it establishes.

I think the judgment ought to be affirmed with costs.

MATHEWS, J. Having consulted with the judge who has drawn up this opinion, whilst he was reducing it to writing, and being perfectly satisfied with the reasons therein adduced, I have barely to say, that I concur therein, deeming it useless to enter into any further discussion of the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Clark for the plaintiff, *Preston* for the defendant.

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PATTERSON & AL. *vs.* M'GAHEY.

PATTERSON & AL. vs. *M'GAHEY.*

Former judgment considered

Judgment was given in this case, in July 1820, 8 *Martin*, 486, a few days before the close of the eastern circuit. On the return of the court, in the winter, a rehearing was granted.

MARTIN, J. We have re-examined this case with great attention. The claimant has established his right; and the plaintiff has not, in my opinion, clearly shewn that the claimant's lien has been destroyed, by the mortgage given by the defendant. It does not satisfactorily appear, that its object was the security of the same debt, nor is the real state of the accounts between the claimant and the defendant shewn to have been reduced to the sum stated by the plaintiff.

I think no alteration ought to be made in the judgment already given.

MATHEWS, J. I am of the same opinion.

It is therefore decreed, that the judgment of this court, pronounced in July last, remain unaltered, and be certified accordingly.

Smith for the plaintiffs, *Turner* for the defendant, *Morse* for the claimant.

MICHEL DE ARMAS' CASE.

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MICHEL DE ARMAS' CASE.

An attorney suspended from his practice, for using indecorous language to the court.

The judges having noticed indecorous expressions, in a written application of this gentleman for a rehearing, in the case of *St. Romes* vs. *Pore*, determined during the last term, *ante* 30, requested the clerk to draw his attention thereto. On the report of the latter, that the former declined amending his application, an order was made, that he answer for the contempt.

He appeared accordingly, admitted himself to be the writer of the paper, and in his attempt at a justification, forgot himself so far as to suggest that the court were disposed to punish him, as the author of some publications, in which he had denounced, in the *Ami des loix*, their declaration made in May last. 9 *Martin*, 642.*

MARTIN, J. Considering the application to be written in arrogant and indecorous language, such as the law forbids us to suffer, I think the attorney ought to be suspended

* It was represented, in that paper, as an assumption of legislative powers, and as an evidence of the court's evil disposition towards that portion of the citizens of this state, whose vernacular language is not the English.

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from his practice in this court during twelve months. *Part.* 3.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that Michel de Armas be suspended from his practice in this court, for twelve months.